current jurisdiction, the rule of equity is to follow the law. This means that in general it protects those rights for which a remedy is given by the law. In the principal case, however, though the law gives a remedy for such damage when caused by other means, it gives none when caused by a prosecution.[8] But a prosecution under an unconstitutional statute is, loosely speaking, a wrong, since on theory an unconstitutional statute does not exist and furnishes no justification for acts done under its apparent authority.[9] The policy of the law in favor of fearless prosecution of criminals and safe and easy recourse to tribunals of justice has confined legal remedies for baseless suits within the strict limits of the action of malicious prosecution. But equity may act preventively in this instance without violating this policy of the law at all. Therefore, as the interest which is threatened is one which under many circumstances equity protects,[10] it is submitted that an injunction should not be denied merely because a policy necessitated by the peculiar legal situation prevents the injury in this instance from being a technical tort.[11]

VOLUNTARY AND INVOLUNTARY SALES OF GOOD WILL. — "A person, not a lawyer, would not imagine that when the good will and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors and draw off all the customers." [1] Nevertheless, in the absence of express stipulations to the contrary, this is permitted by the great weight of authority.[2] What then is the good will which is sold? Good will may be said to be that advantage which is inherent in an established business over and above the actual property employed. It includes "the probability that the old customers will resort to the old place," [3] and the advantages from custom or business connection,[4] em-

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[8] Smith *v.* Adams, 27 Tex. 28.

[9] Dodge *v.* Woolsey, 6 McLean (U. S.) 142, Fed. Cases 18,033; Osborn *v.* Bank, 9 Wheat. (U. S.) 738; Southern Express Co. *v.* Rose, 124 Ga. 581, 53 S. E. 185.

[10] 1 HIGH ON INJUNCTIONS, 4 ed., § 1415e; Barr *v.* Essex Trades Council, *supra*; Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553; Hawardon *v.* Youghiogheny & Lehigh Coal Co., 11 Wis. 545, 87 N. W. 472.

[11] It is often said that one cannot enjoin a suit to which he is not a party. New York *v.* Conn., 4 Dall. (U. S.) 1. But on many occasions such injunctions have been issued. In McCullough *v.* Absecom Co., 10 Atl. (N. J.) 606, the petitioner in a suit to quiet title was allowed to enjoin a partition suit pending as to the same land. In Fisher *v.* Lord, 9 Fed. Cases 4,821, petitioner was allowed to enjoin a suit on a note he claimed to own. In *In re* Walker, 123 Pa. 381, petitioner was allowed to enjoin a suit to enforce a title to stock which he claimed to own. In Sumner *v.* Marcy, 3 Woodb. & M. (Fed.) 105, a stockholder was allowed to enjoin a judgment against the corporation which would subject him to a statutory liability.

[1] Plumer, V. C., in Harrison *v.* Gardner, 2 Madd. 198, 219.

[2] Cruttwell *v.* Lye, 17 Ves. 335; *In re* David (1899), 1 Ch. 378; Basset *v.* Percival, 5 Allen (Mass.) 345; Smith *v.* Gibbs, 44 N. H. 335; Von Bremen *v.* MacMonnies, 200 N. Y. 41, 93 N. E. 186; White *v.* Trowbridge, 216 Pa. St. 11, 64 Atl. 862; Zanturjian *v.* Boornazian, 25 R. I. 151, 55 Atl. 199. See HOPKINS, UNFAIR TRADE, § 84; 1 COLLYER, PARTNERSHIP, 6 ed., 571.

[3] Lord Eldon in Cruttwell *v.* Lye, *supra*, p. 346.

[4] See Trego *v.* Hunt, [1896] A. C. 7, 19; STORY, PARTNERSHIP, § 99; ALLEN, GOOD WILL, 8.

bracing trade marks and trade names.[5] In this sense good will is property and is assignable.[6] Good will also refers to the reputation and the friendliness of the public enjoyed by the particular man himself. This is by nature unassignable. The vendee can partially get the advantage of it if by contract he induces the vendor to endeavor to create by recommendation a new friendliness toward him on the part of the public. In the absence of this sort of agreement it is obviously to the advantage of the assignee that this personal good will of the vendor be removed from the field of competition. But the vendor is free to re-enter the trade unless there can be found some personal obligation, either express or implied from the transaction, not to compete. For if it is clear that there is no such personal obligation, the vendor, having given up all connection with the property, becomes justified like a third party [7] in interfering by competition.[8] So in a forced dissolution of a partnership or a sale by a trustee in bankruptcy, where there can be merely a sale of the property and no further personal obligations, the vendor is properly allowed to re-enter business. The early cases were of this sort; [9] but no distinction was taken later in the case of voluntary sales,[10] although, on analogy to warranties,[11] a contract obligation incidental to the transfer might well have been implied from the natural imputation of the vendor's retirement.[12] With the exception of a few desultory cases,[13] the Massachusetts courts have been alone in thus implying an obligation not to enter and compete in the same trade.[14]

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[5] Hudson *v.* Osborne, 39 L. J. Ch. 79; Levy *v.* Walker, 10 Ch. D. 436; Merry *v.* Hoopes, 111 N. Y. 415.

[6] The assignment of a business takes this property good will with it without express reference.

[7] Snowden *v.* Noah, 1 Hopk. Ch. (N. Y.) 347.

[8] The vendor may not resort to unfair competition such as claiming to be the successor of the business he has sold, Hall's Appeal, 60 Pa. St. 458; Cottrell *v.* Babcock, 54 Conn. 122, 6 Atl. 791; Hookham *v.* Pottage, L. R. 8 Ch. 91; or using his name in such a manner as to deceive, Churton *v.* Douglas, Johnson, 174; Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 20 N. W. 545. But in the absence of unfairness he may use his own name. Ranft *v.* Reimers, 200 Ill. 386, 65 N. E. 720; White *v.* Trowbridge, *supra*; LINDLEY, PARTNERSHIP, 8 ed., 509.

[9] Cruttwell *v.* Lye, *supra*; Cook *v.* Collingridge, 27 Beav. 456; Hall *v.* Barrows, 4 DeG. J. & S. 150; Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510. This was fair to the purchaser, as he was given notice in fixing the price that the former owner could compete. Cook *v.* Collingridge, *supra*; Hall *v.* Barrows, *supra*.

[10] See cases in Note 2, *supra*.

[11] See Dwight *v.* Hamilton, 113 Mass. 175, 177. Even where there is an express warranty of good will, however, the vendor is allowed to start business again. Costello *v.* Eddy, 12 N. Y. Supp. 236.

[12] See Trego *v.* Hunt, *supra*, pp. 19, 24; Hutchinson *v.* Nay, 187 Mass. 262, 72 N. E. 974. Unlimited restraint of trade has been advanced *ex post facto* as a reason for not implying a covenant not to compete. Trego *v.* Hunt, *supra*, pp. 27, 29. But where an express covenant not to re-enter business is too broad to be entirely enforcible, it is nevertheless held valid within reasonable limits. Althen *v.* Vreeland, 36 Atl. 479 (N. J.). As an implied covenant could be treated in the same way, there is no weight to this objection.

[13] Wentzell *v.* Barbin, 189 Pa. St. 502, 42 Atl. 44; Brown *v.* Benziger, 118 Md. 29, 84 Atl. 79. See Townsend *v.* Hurst, 37 Miss. 679; Yeakley *v.* Gaston, 111 S. W. 768 (Tex. Civ. App.).

[14] Dwight *v.* Hamilton, *supra*; Munsey *v.* Butterfield, 133 Mass. 492; Old Corner Book Store *v.* Upham, 194 Mass. 101, 80 N. E. 228; Foss *v.* Roby, 195 Mass. 292, 81 N. E. 199; Gordon *v.* Knott, 199 Mass. 173, 85 N. E. 184; Marshall Engine Co. *v.*

A limitation to the acknowledged right to competition was laid down by Lord Romilly. Admitting that a vendor after a sale of good will may solicit business generally by advertisement,[15] he decided that a voluntary sale of good will implied a promise not to solicit the old customers directly.[16] This case gave rise to a variety of opinions in England [17] and was overruled,[18] but finally the English law was again settled in accord with Lord Romilly.[19] In the meantime some American authority had followed the contrary case,[20] but the better authority now so restricts a voluntary vendor.[21] It would seem that the reasons underlying the implication of a promise not to solicit old customers would logically cover a promise not to compete in other ways. But because the courts, except Massachusetts, were previously bound to the wrong rule as to re-entering business, seems no reason for sacrificing justice in a situation where the question raised was *res integra*.

The courts which have thus denied the right of solicitation after a voluntary sale have nevertheless allowed the vendor free rein after an involuntary sale.[22] The policy of the Bankruptcy statute has been given as the reason.[23] As some of the cases, however, are of forced sales other than in bankruptcy, the true reason must be that the courts recognize that there can be no implied promise of any kind when the sale is involuntary or when the vendor is not a contracting party.

An interesting case came up in England, where good will was sold by the assignee of a voluntary assignment for the benefit of creditors. It was held that the assignor might again solicit his former customers. *Green & Sons* v. *Morris*, Weekly Notes 65 (Ch. Div., Feb. 6, 1914). While the courts sometimes have gone rather far in implying an obliga-

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New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548. But see Fairfield *v.* Lowry, 207 Mass. 352, 93 N. E. 598.

[15] Cruttwell *v.* Lye, *supra*.

[16] Labouchere *v.* Dawson, L. R. 13 Eq. 322.

[17] Ginesi *v.* Cooper, 14 Ch. D. 596; Leggott *v.* Barrett, 15 Ch. D. 306; Mogford *v.* Courtenay, 45 L. T. R. 303.

[18] Pearson *v.* Pearson, 27 Ch. D. 145.

[19] Trego *v.* Hunt, *supra*. This rule extends even to soliciting those who have voluntarily come back. Curl Bros. *v.* Webster, [1904] 1 Ch. 685. There is much talk in the books that the vendor cannot solicit because it would be "derogating from his grant." This reasoning is circular, for the question at issue is: what has been granted?

[20] Cottrell *v.* Babcock, *supra*; Williams *v.* Farrand, 88 Mich. 473, 50 N. W. 446; Marcus Ward & Co. *v.* Ward, 15 N. Y. Supp. 913. Other American decisions allowing the vendor to solicit but not depending directly on Pearson *v.* Pearson, *supra*, are Bergamini *v.* Bastian, 35 La. Ann. 60; MacMartin *v.* Stevens, 37 Wash. 616, 79 Pac. 1099. Where the contract expressly allowed the vendor to re-enter business at the end of a certain period, the right to solicit has been implied. Hanna *v.* Andrews, 50 Ia. 462; Armstrong *v.* Bitner, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136.

[21] Ranft *v.* Reimers, *supra*; Brown *v.* Benziger, *supra*; Gordon *v.* Knott, *supra*; Snyder Pasteurized Milk Co. *v.* Burton, 80 N. J. Eq. 185, 83 Atl. 907; Von Bremen *v.* MacMonnies, *supra*; Zanturjian *v.* Boornazian, *supra*. Likewise the vendor cannot solicit the return of his old employees, Acker, Merrill & Condit Co. *v.* McGaw, 144 Fed. 864, nor obtain his former telephone, Ranft *v.* Reimers, *supra*; Brown *v.* Benziger, *supra*.

[22] Walker *v.* Mottram, 19 Ch. D. 355; Dawson *v.* Beeson, 22 Ch. D. 504; Hutchinson *v.* Nay, *supra*. Griffith *v.* Kirley, 189 Mass. 522, 76 N. E. 201; Kates *v.* Bok, 124 N. Y. Supp. 297.

[23] See Walker *v.* Mottram, *supra*, p. 364.

tion on the vendor in what were apparently forced sales,[24] an assignment for the benefit of creditors would seem clearly to raise no implication that the vendor would not later hold himself free to exercise full rights of competition. So the recent case seems correct.

APPLICATION OF THE RULE IN ARCHER'S CASE IN AMERICA. — At common law under the English system of primogeniture there could be only one *heir* existing at any given time.[1] Consequently, when the plural word *heirs* was used in conveyancing, it could only refer to a chain of inheritable succession from a progenitor and could not mean a coexisting class of individuals answering to the description of heirs. *Heirs* came to be the technical word used to limit an estate of inheritance which would follow through the entire structure of descent from the progenitor.[2] Hence, when the situation, illustrated in Shelley's Case,[3] arose, where in the same instrument a remainder was limited to the *heirs* or *heirs of the body* of the donee or grantee of the prior life estate, it was not surprising that the courts, clinging to the technical meaning of the word *heirs*, found an attempt to pass the remainder as if an inheritance from the holder of the life estate.[4] The words were words of limitation, or outline of a structure of descent from the progenitor named, the form alone that of purchase. The remainder was, therefore, read as a fee or fee tail in the ancestor, into which the life estate might merge.[5] Since then the English cases have consistently given effect to the technical meaning of the plural word *heirs* or *heirs of the body* by refusing to consider context inconsistent with the technical legal import.[6]

When the singular word *heir* was used, however, the situation has been different.[7] It could denote a line of descent, if used collectively, or a particular individual, if used singly. With no restrictive context it was

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[24] Jennings *v.* Jennings, [1898] 1 Ch. 378; *in re* David, *supra*; Von Bremen *v.* MacMonnies, *supra*.

[1] See FEARNE, C. R., 10 ed., pp. 181–185; CHALLIS, REAL PROPERTY, 3 ed., p. 221; 14 L. QUART. REV. 98; Burnett *v.* Coby, 1 Barn. 367; Doe *v.* Harvey, B. & C. 610; Jesson *v.* Wright, 2 Bligh 1, at p. 53.

[2] See 1 Coke, 104 *b*; 29 L. R. A. N. S. pp. 1039–1065. *Cf.* CHALLIS, REAL PROPERTY, 238, 242, 166; and note an exceptional case, Mandeville's Case, Coke Litt. 266.

[3] 1 Coke, 93 *b*; reprinted in CHALLIS, REAL PROPERTY, 154; 29 L. R. A. N. S. 968.

[4] *Cf.* 29 L. R. A. N. S. 1006–1007.

[5] See 1 TIFFANY, REAL PROPERTY, § 130; 1 HAYES, CONVEYANCES, 5 ed., 542–546; Van Grutten *v.* Foxwell, [1897] A. C. 658, 668.

[6] Wright *v.* Pierson, 1 Eden 119; Measure *v.* Gee, 5 B. & Ald. 910; Jesson *v.* Wright, 2 Bligh 1; Doe *v.* Harvey, 4 B. & C. 610; Mills *v.* Seward, 1 J. & H. 733; Jordan *v.* Adams, 9 C. B. N. S. 483; Van Grutten *v.* Foxwell, [1897] A. C. 658. Decisions seemingly *contra* have invariably been in cases of wills, where the word *heirs* has clearly been used loosely in a non-technical sense as the equivalent of *children* and the like. See Doe *v.* Lanning, 2 Burr. 1100; Crump *v.* Wooley, 7 Taunt. 362; Doe *v.* Goff, 11 East 668; Bull *v.* Comberbach, 25 Beav. 540; Right *v.* Creber, 5 B. & C. 866. *Cf.* Measure *v.* Gee, 5 B. & Ald. 910. In Doe *v.* Goff, *supra*, Lord Ellenborough said at pp. 671–672: "And the words which follow put it past all doubt that the testator used the words 'heirs of the body' not as words of limitation . . . but as equivalent to *children* or *issue of her body*. . . ." See 1 FEARNE, C. R. 186–197; 1 TIFFANY, REAL PROPERTY, § 132; 10 HARV. L. REV. 66.

[7] See 1 FEARNE, C. R. 150, 178; CHALLIS, REAL PROPERTY, 230; 29 L. R. A. N. S. 1017.